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In the

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,
Petitioner

vs.

CPC INTERNATIONAL, INC., et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY

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TABLE OF AUTHORITIES

PAGE

CASES

Oncale v Sundowner Offshore Services, Inc.,
118 S. Ct. 998, 1998 U.S. LEXIS 1599 (1998) 1, 3

STATUTES

CERCLA § 107(a)(2) 2, 3, 4, 7

SUPPLEMENTAL BRIEF OF THE CORDOVA RESPONDENTS

Aerojet-General Corporation, Cordova Chemical Company, and Cordova Chemical Company of Michigan ("the Cordova Respondents") submit this Supplemental Brief under Rule 25.5 to address two new matters arising after the filing of their Brief. The first new matter is this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1998 U.S. LEXIS 1599 (1998). The second is CPC's false accusation in its Supplemental Brief that the Cordova Respondents have misstated the record.

I. On March 4, 1998, this Court issued its opinion in *Oncale v Sundowner Offshore Services, supra*. *Oncale* involved the interpretation of Title VII of the Civil Rights Act of 1964, but the straightforward approach to statutory interpretation taken by this Court in *Oncale* is equally applicable here. In *Oncale*, the question presented to this Court was whether workplace harassment could violate Title VII's prohibition against "discrimination. . . because of. . . sex" when the harasser and the harassed employee are of the same sex. *Oncale*, 1998 U.S. LEXIS at *3. This Court unanimously held that it could, and in so doing rejected two errors. First, this Court refused to read into the statutory text a liability exception for same sex harassment that Congress itself did not include. *Id.* at *7. Second, the Court refused to isolate any one element of a statutory liability standard that by its terms includes multiple elements. In particular, the Court emphasized that the statute in *Oncale* did not prohibit all workplace harassment, but only harassment or other discrimination "because of. . . sex". *See, e.g., id.* at *8, *9; *id.* at *12-13 (Thomas, J. concurring).

In this case, the Court is presented with the question of whether, and under what circumstances, a parent corporation may

be held directly liable under §107(a)(2) of CERCLA for pollution at a site where its subsidiary conducted business. The answers proposed by the United States, on the one hand, and by CPC, on the other hand, commit the same errors just rejected in *Oncale*.

The United States improperly attempts to isolate only one element of a multiple element liability test created by the statutory text of §107(a)(2). Thus, according to the United States, CPC and Aerojet are liable under §107(a)(2) if they "operated" facilities at the Muskegon site, apparently without regard for whether they did so "at the time of disposal of any hazardous substance." *See* United States Reply Brief at 2 (construing "Section 107(a)(2) to impose direct liability on a 'person,' whether a corporation or an individual, if the person actively participated in, and exercised control over, the running of a facility."). By isolating only one word of the liability imposing statute, the United States commits the same error this Court rejected in *Oncale* by responding to those who isolated the term "discrimination" from the qualifying phrase "because ... of sex." In Section 107(a)(2) of CERCLA, Congress created liability for operators, but only those operators who operated facilities "at the time of disposal of hazardous substances," a qualifying phrase the government ignores.

CPC commits the other error rejected by this Court in *Oncale*: namely, the error of reading into the statutory text a blanket exception from liability that Congress itself did not include. CPC properly rejects the test proffered by the United States, but in proposing its own test for parent corporation liability under §107(a)(2), CPC as a practical matter equates the limits of federal statutory liability with state law veil-piercing, thereby creating an unarticulated liability exemption for most parent corporations. By reading into Section 107(a)(2) a special, categorical protection for parent corporations that Congress itself did not include, CPC commits the same error this Court rejected

in *Oncale* by responding to those who argued that the statutory terms "discrimination ... because of ... sex" implied a categorical exclusion for same sex harassment.

This Court should require the same "careful attention to the requirements of the statute" in cases under §107(a)(2) that it demanded in *Oncale* and hold that parent corporations can be liable as operators under §107(a)(2), but only where the nexus between such a corporation and the pollution at the facility has been established, as required by the plain terms of the statute.[1] The Cordova Respondents respectfully submit that they are the only parties before the Court that have offered a liability test that honors the text, the legislative history, and policy of the statute.

II. The supplemental brief of CPC accuses the Cordova Respondents of "fabricat[ing]" (at 3), "exaggerating" (at 3) or otherwise misstating the record (at 2, 3, 4 n.4, 5 and 6). These accusations are false. The Cordova Respondents have done

[1]The United States tacitly acknowledges the importance of this nexus at two points in its Reply Brief, even though it formally maintains that the Court need not reach the question posed by the Cordova Respondents of whether any "disposal" occurred during the tenure of the Cordova Respondents. The United States asserts that "CPC and Aerojet are liable precisely *because* the factual record shows that they directly participated in the operational decisions **that caused the hazardous condition at the Muskegon site**." (United States Reply Brief at 3 (italics original; bold added).) Similarly, the United States claims that §107(a)(2) authorizes recovery "from those entities that exercised managerial control over the running of the facility and the day-to-day decisionmaking **that created the hazardous situation**". (*Id.* at 6 (emphasis added).) These statements from the government beg precisely the question the government urges this Court to ignore: namely, whether any operations of the Cordova Respondents caused contamination at the site or, in the language of the statute, whether the operations occurred "at the time of disposal of any hazardous substance." The Cordova Respondents did not cause contamination at the site, and the district court did not find to the contrary. (Brief of the Cordova Respondents (at 3-5).) Indeed, the government's own witnesses acknowledge that the Cordova Respondents did not cause contamination at the site. (*Id.* at 4-5.)

nothing other than highlight the findings and evidence in the record supporting a judgment of liability against CPC based on its own activities at the site.[2]

A. CPC complains about the Cordova Respondents' reference to the district court's finding that CPC engaged in both major policy-making and day-to-day operations at its subsidiary's site. (CPC Supp. Brief at *2*). The Cordova Respondents have not in any way misrepresented the record. The district court concluded as a matter of fact that CPC did involve itself in both policy-making and day-to-day operations. *See* Pet. App. at 67a (CPC's involvement in policy-making decisions); 69a (CPC's involvement in day-to-day decision-making); 71a (CPC's involvement in its subsidiary's decision-making "created controversy and strains within the subsidiary"); 72a (CPC's development company helped "shape decision and affect personnel changes" at the subsidiary); 74a, 111a (summarizing and applying factual findings). CPC attempts to discount the

[2] CPC's suggestion that the Cordova Respondents are "not adverse to the United States and Michigan in any significant way" (CPC Supp. Brief at 1) is absurd. *See also* Reply of the Cordova Respondents in Support of Motion for Divided Argument (discussing the adversity of the parties, including CPC, the Cordova Respondents and the government, throughout the litigation). Like Respondent CPC, the Cordova Respondents have vigorously contested their liability at every stage of this litigation. Moreover, like respondent CPC, the Cordova Respondents have asserted that the government's proposed "participation and control" standard is an erroneous construction of CERCLA § 107(a)(2) that confuses two analytically distinct theories of liability: namely, a derivative liability theory that must be premised on state law principles of corporate veil piercing, and a distinct direct liability theory that depends upon a faithful application of CERCLA's statutory text. (Cordova Brief at 1-2, 22-23, 24-27.) The Cordova Respondents do, however, believe that CPC's conduct at the site subjects it to liability consistent with both the text and policy of § 107(a)(2), (*Id.* at 26 n. 10), a position the Cordova Respondents have maintained throughout this litigation.

findings by alleging that the district court made them only by assuming that CPC's veil should be pierced, but this insinuation flies in the face of the district court's express reservation of the question of piercing CPC's veil. (Pet. App. at 112a.) CPC may not like the factual findings highlighted by the Cordova Respondents, but it cannot credibly ignore them.

B. CPC alleges that Aerojet "fabricat[ed]" its description of the CPC development company's role at the Ott site (CPC Supp. Brief at 3), but this allegation ignores both the district court's express factual findings and the specific citation of the Cordova Respondents to the record. The district court found as a matter of fact that CPC used its unincorporated development company to implement its will at the Ott site. (Pet. App. at 72a-74a, 111a.) Moreover, Dr. Garber, a participant in the board of directors of the CPC development company, expressly testified in his deposition that the directors of the development company board functioned as the directors of the operating companies themselves:

> Q. In your judgment, was this gathering of people [the development company board] the group that functioned more as the directors of the operating companies [one of which was Ott II] than the formal directors of the operating companies themselves?
>
> A. I would say so, yes.

(JA: 2922, Garber Dep. at 37.) Again, CPC may not like the record, but this is what it contains.

C. CPC next contends that the Cordova Respondents exaggerated the role of a CPC executive, G.R.D.

Williams, at the Ott site. (CPC Supp. Brief at 4-5.) But once again, the Cordova Respondents simply recited record evidence supporting an explicit finding of the trial court. The district court concluded that Mr. Williams of CPC directly intervened in Ott's affairs to prevent Ott from disclosing to State regulators a plan for construction of a biological waste treatment plant:

> In the meeting with the Water Resources Commission, Williams participated in discussions, which, *as a result of his influence,* did not include presentation by Ott II of plans for a biological waste treatment facility. Williams did not feel that Ott II should mention the option because he did not think it would be needed as a waste disposal alternative.

Pet. App. 75a (emphasis added). Even though Ott's own Vice President of Manufacturing and Ott's own private consultant recommended the biological treatment plant, the evidentiary record demonstrates that Mr. Williams' judgment prevailed. Ott never built the treatment plant. (JA: 3286, Hellman, Tr. at 1367; JA: 3404, Newhof, Tr. at 1112.) Mr. Williams later reported to his superiors at CPC that he hoped this would save the company $350,000. (JA: 2180, 2182, December 1, 1966, Williams Progress Report, at 3.)

D. CPC next labels as "absurd" the contention of the Cordova Respondents that CPC retained an equity interest in Story Chemical following the sale of Ott II. (CPC Supp. Brief at *6*.) Once again, CPC's rhetoric ignores the record. CPC sold Story in exchange for $6.6 million in cash *and* $4 million of convertible subordinated debt. (Pet. App. 78a; JA: 2407, March 15, 1976, Agreement between CPC and Story.) This effectively gave CPC an equity stake in Story,

and it is for that reason that CPC placed one of its executives, Beverly Warner, on the board of Story Chemical. CPC ultimately exchanged the convertible subordinated debt for Story's promise not to hold CPC liable for Story's mounting obligations. (JA: 2407, March 15, 1976, Agreement Between CPC and Story.)

ACCORDINGLY, the Cordova Respondents urge this Court to conclude under the plain language of § 107(a)(2) that Aerojet cannot be liable because it did not operate facilities at a time of disposal at the site, but that CPC can be liable—not because it participated in managing its subsidiary—but because it directly operated facilities at a time those facilities were polluting the site owned by the CPC subsidiary.

Respectfully submitted,

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